NO: FST-CV 16-5016074-S	:	SUPERIOR COURT
JOHN DOE, PPA MOTHER DOE, ET AL.	:	J.D. OF STAMFORD/NORWALK
v.	:	AT STAMFORD
WILTON BOARD OF EDUCATION AND TOWN OF WILTON	: :	AUGUST 16, 2019

MOTION FOR REARGUMENT AND RECONSIDERATION

The defendants, pursuant to Practice Book 11-12, hereby move the Court for reargument and reconsideration of the Court's decision (Doc. 177.01) on the Defendants' Motion for Summary Judgment (Doc. 177.00).

Argument Supporting Reargument And Reconsideration

The Court denied the Defendants' Motion for summary judgment, finding that an issue of fact existed as to the applicability of the identifiable person subject to imminent harm exception to governmental immunity for. Specifically that an issue of fact existed as to whether it was apparent to preschool director , Dr. Rapczynski, that Boy Doe was subject to imminent harm.

The defendants move for reargument and reconsideration of this ruling because it is contrary to Connecticut Supreme Court precedent. Specifically, the Connecticut Supreme Court has made it clear that the identifiable person/imminent harm exception applies when it is apparent that a specific imminent harm will befall a specific identifiable person. See Brooks v. Powers, 328 Conn. 256 (2018). Given that our case involves a school child claiming injury during school hours in on school grounds, the identifiable person element is deemed to have been satisfied; but the apparentness

and specific imminent harm requirements still apply. Related to the facts of our case on the negligent hiring claim, for the exception to apply the plaintiff must demonstrate that it was apparent to Dr. Rapczynski that if he hired Eric von Kohorn based on the representations made on his resume and information received from references, he would be subjecting Boy Doe, who would attend the preschool 6-7 years in the future, to an imminent harm which was not and could not be specified. If we move forward in time to the negligence claim stemming from the Girl Doe investigation in January 2013, again the question as to governmental immunity is whether it was apparent to Dr. Rapczynski at that time that if he did not terminate Eric von Kohorn's employment at that time he would be subjecting all of the preschool students to nude photographing or other sexualized behavior by von Kohorn. The Court will recall that the Girl Doe case involved a complaint made against von Kohorn that involve one instance of misconduct reported to the school by a parent, that could not be substantiated by the schools investigation, and which DCF declined to investigate. It was a scenario where Girl Doe made a complaint, Eric von Kohorn denied any type of sexualized activity, there were no independent witnesses, and obviously no video tape of what might have occurred in a bathroom. As a matter of law, that set of circumstances would not make it apparent to Dr. Rapczynski that Boy Doe was subject to imminent harm at the hands of Eric von Kohorn--a harm, nude photographing, that allegedly took place between nine and 15 months later. In the interim, the 2012-13 school year ended, with hundreds of students cycling through the system daily, summer vacation ensued, and the first two months of the 2013-14 school year were

completed, again with hundreds of students cycling through the hallways, through classrooms and bathrooms at Miller Driscoll School without an Eric von Kohorn-related incident. This is not the message from the Connecticut Supreme Court regarding what constitutes an apparent imminent harm. See Brooks v. Powers 328 Conn. 256 (2018); Martinez v. New Haven, 328 Conn. 1 (2018); Strycharz v. Cady, 323 Conn. 548 (2016)

It is undisputed that there is no evidence that neither Dr. Rapczynski nor any other adult who had supervisory liability saw Eric von Kohorn take Boy Doe alone into the bathroom. In addition, there is no evidence that knowledge by an adult that Eric von Kohorn took Boy Doe in a group, along with other boys, to the bathroom and supervised them would constitute an imminent harm. See Martinez v. New Haven, supra. Finally, to say that it would have been apparent to Dr. Rapczynski in January 2013 that nude photographing would take place of a “typical peer “child (Boy Doe has no disability) 9-15 months later, completely disassociates the imminent harm requirement from the apparentness requirement which is against Supreme Court precedent. See, Powers, Martinez, Cady, supra. The alleged photographing of Boy Doe, alleged to have occurred between late fall 2013 and spring 2014, is simply too attenuated from the activity occurring in January 2013 surrounding Girl Doe, even when considering all facts in the light most favorable to the plaintiff. Brooks v. Powers, supra. Accordingly, summary judgment should enter on the negligence claims based on governmental immunity.

Summary judgment should also enter on the claim of negligent infliction of emotional distress. Being a negligence claim, the same immunity doctrine applies as discussed above. The Court did not address the immunity issue at all in addressing the negligent infliction of emotional distress claim in its memorandum of decision. But it is undisputed that at no time would it have been apparent to Dr. Rapczynski that his actions during the Girl Doe investigation (January 2013) would subject typical peer like Boy Doe to an imminent harm of being photographed naked nude 9-15 months later---and that parents would learn about the photographs 2 1/2 years later and suffer emotional distress. This approach would be contrary to the teachings of the Supreme Court in Brooks, Cady, and Martinez that imminent harm does not equate to foreseeability, and the imminence of the harm must be apparent to a municipal actor for the exception to apply.

Finally, while the Court's decision makes it clear that summary judgment was denied based on the existence of an issue of fact as to the application of the exception to governmental immunity, there are portions in the body of the decision which purport to make findings that the exception does not apply. To the extent the Court intended the discussion in the body of the decision to be an affirmative finding that the defendants' defense of governmental immunity does not apply, the defendants seek reargument and reconsideration of that finding so it is clear that the defendants' motion for summary judgment was denied based on the presence of an issue of fact as to whether the governmental immunity defense applied, and that the Defense remains

available to be proved at trial, with the plaintiff retaining the burden to prove an exception to governmental immunity at trial.

For the reasons set forth above, the Defendants seek reargument of the Court's decision, Doc. 177.01.

DEFENDANTS,
WILTON BOARD OF EDUCATION AND
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CERTIFICATION

This is to certify that a copy of the foregoing Motion for Reconsideration was or will immediately be mailed or delivered electronically or non-electronically on August 16, 2019, to all parties and self-represented parties of record and that written consent for electronic delivery was received from all attorneys and self-represented parties receiving electronic delivery.

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